

OCC NewsLetter

NASA Langley Research Center

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Happy New Fiscal Year!



In the lead up to Langley's exciting Centennial year, OCC recently worked closely with the Office of Procurement and program personnel to successfully defend a high powered protest of the STARSS III contract award. We have been honored to recognize our Patent Counsel, Robin Edwards, with an Agency Honor Award, and we have brought a new and energetic patent attorney, Jonathan Soike, from private practice on to our Intellectual Property Law Team (IPLT). Read more about Jon on page 2. This makes our IPLT the largest of our legal teams and represents great capability upon which Langley can continue leading the Agency as one of the top producing Centers in terms of issued patents, royalty funds received, technology transfer and, significantly, software development and release. You may have heard that Pete Polen is currently detailed to Johnson Space Center and his counterpart from JSC, Donna Shafer, is here at Langley as Acting Deputy through December. Donna brings a wealth of experience and we are fortunate to have her expertise here at LaRC. Read more about Donna on page 2. This exchange promises to bring new ideas and efficiencies to both Centers, enhances the outstanding leadership skills of two of the Agency's very best attorneys, and demonstrates how we can work across geographical bounds as a premier Agency legal team.

Also enhancing our legal team's ability to support the Agency wherever legal work or challenges arise, Donna recently became our Agency legal team's overall interface with the Agency CIO team that is implementing our new information technology tools that will bring all of our legal offices together at new heights. As our lead for this effort, Donna is helping coordinate work by other members of our legal team, including our own Dacia Bruns, to stand up a legal intranet called NASALawNet that will enable an enterprise solution for knowledge sharing and real time collaboration between attorneys across the Agency. Our next step for enhancing this capability is coordinating with another CIO-Legal team, including our own Andrea Warmbier, to identify and make available to all legal offices a separate legal document management and electronic case management tool set. Since Donna has for several years led our Agency legal mentoring program, called YODA (Your Opportunity to Develop Another), she's a great fit to provide initial leadership for our new legal sharing tools and organization. Meanwhile, we've managed to put this Newsletter together in the absence of our regular editor, Pete Polen, with the outstanding dedication of Dacia, Andrea and the several other attorneys who contributed articles. We miss Pete and look forward to his return around the end of the 2016 calendar year.

With Yvette Mardis' great organizational skills and energy, I'm also very pleased to be serving as this year's Combined Federal Campaign Chair for the Center. Please take a moment and consider our theme: "Give for the First Time or Give Again – Give for Good!"

Enjoy this quarter's newsletter and reading about several of the Center's legal related activities as we embark upon FY 2017!

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LaRC Chief Counsel

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W e l c o m e



Jonathan Soike, Patent Attorney

LaRC OCC is pleased to welcome Jonathan Soike to our Intellectual Property Team! Jonathan comes to LaRC from Crawford Maunu PLLC, a Minnesota-based intellectual property law firm. Jonathan's patent practice covered a wide range of technologies including software, simulation and modeling systems, analog and digital circuits, semiconductor design and fabrication, materials science, data security/encryption, system hardening, communication systems, electronic design automation, distributed computing, wireless networks, Radio Frequency and Multiple-Input-Multiple-Output transceivers, and analog and digital signal processing. He also has significant experience in computing architectures including field-programmable gate arrays, system-on-chip, microprocessor and systolic array architectures.

Jonathan earned a B.S. in Computer Engineering with distinction from Iowa State University. He also holds federal certification from the Committee on National Security Systems relating to the analysis of exploits and vulnerabilities present in various networking, authentication, encryption, and wireless transfer protocols. He earned his J.D. from Drake University where he graduated with honors. While at Drake he served as President of the Intel-

lectual Property Society, competed in moot court, and assisted with several publications on international intellectual property. Jonathan is licensed to practice law in the State of Minnesota and is further registered to practice before the United States Patent and Trademark Office.

Please join us in welcoming Jon!

Donna M. Shafer, Acting Deputy Chief Counsel, NASA LaRC, and Deputy Chief Counsel, Johnson Space Center

OCC is pleased to have Donna Shafer serving as Acting Deputy Counsel through December, 2016. Donna is the Deputy Chief Counsel at the NASA Johnson Space Center (JSC). Donna earned a Doctorate of Jurisprudence (J.D.) degree from the University of Houston. She began her NASA career at JSC in 1989 as a Security Specialist, and joined the JSC Legal Office in 1997 where she has held progressively more responsible positions. Donna has experience in all legal practice areas, and served as the Assistant Chief Counsel for Procurement matters, Assistant Chief Counsel for International and Commercial matters, and the Assistant Chief Counsel for General Legal matters. Donna also served as the Legal Advisor to the Columbia Task Force and co-authored, with Amy Xenofos, JSC Lead for General Legal Matters, the Aero-medical Legal Operations chapter of *Loss of Signal*, Aeromedical Lessons Learned from the STS-107 Columbia Space Shuttle Mishap. (May 2014).

We are looking forward to working with Donna over the next few months. Please join us in welcoming Donna!

Dealing with Protests – How LaRC Won the STARSS III Protest

About four years ago we included a short primer on bid protests in the Business Law Team column of this Newsletter. Recently LaRC experienced a protest of the award of the STARSS III contract, a \$253 million Science Directorate technical support services contract. This article describes some of the work involved to protect LaRC's legal interests and ensure the Government Accountability Office (GAO) denied the protest. Winning a protest, as you will see, is a major effort involving a team to make it happen.

The Protest and Initial Response. The protester filed a 61 page protest document with GAO following its post-award debriefing on the conduct of the proposal evaluations and award decision. The protest covered a wide range of allegations, arguing LaRC improperly evaluated its proposal with respect to its technical, cost and past performance proposals. Upon receipt of the protest, we immediately formed a team to address the allegations, as well as to assemble the Agency Report (AR), which documents how the source selection was conducted. We had to determine whether to stay performance of the STARSS III contract, and did so in this case. The team consisted of personnel from OCC, the Office of Procurement (OP) and some members of the Source Evaluation Board (SEB). In order to address both the logistical issues (assembling the AR) as well as dealing with the allegations, the work was split up. One group assembled the AR, scanned everything into portable document format, applied sequential numbering of each page and created the index to the AR. Another group worked on the required Contracting Officer Statement of Fact (COSF), which dealt with the factual allegations made by the protester, as well as to explain the procurement history, relevant provisions of the solicitation, and how the evaluation was performed. In order to meet the requirement to have the AR, including the COSF, to NASA Headquarters (HQ) within 20 days, OP split the COSF drafting into two pieces: The background and conduct of the evaluation; and the response to the allegations in the protest. Further, OCC had to draft a legal memorandum to address the legal arguments made by the protester. This research included reading the roughly 40 cases cited by the protester in its initial and supplemental protests, and citing about 35 cases in the two NASA legal memoranda. Only after we met several times to go over the protest allegations and our plan of attack were we ready to begin drafting the response. Drafting of the legal memorandum began once the first draft of the COSF was available.



This work consumed the efforts of at least seven people full time, including numerous meetings among the team members on many days to confirm we all were working together to ensure the COSF and AR properly meshed up, to fashion the strategy for the Agency response, and to coordinate with HQ Office of the General Counsel (OGC). The COSF and legal memorandum had to complement each other, so we swapped drafts of the two documents among the team members and OGC to ensure all issues were covered in a consistent manner. The two team members who assembled the AR, which ultimately included more than 2000 pages of documentation, also needed to be involved to verify the numerous references to the record in the COSF and legal memorandum were correct. Both the COSF and legal memorandum went through many drafts before they were ready for submission to the GAO.

In addition, OCC worked with the awardee's counsel by reviewing and providing comments to its response to the protest. We also took into consideration their comments on NASA's legal memorandum to ensure our respective arguments harmonized with each other.

The Supplemental Protest and Response. The AR was filed with GAO 30 days after the protest was submitted. The protester then requested additional documents and filed an 81 page supplemental protest, making further allegations with regard to how the evaluation was conducted. Once again, the team assembled to evaluate the allegations and formulate a response. Both a supplemental COSF and legal memorandum had to be drafted and submitted within two weeks. This meant interviewing relevant personnel, performing additional research, drafting the documents, having several half-day and one all-day session to meticulously review the supplemental COSF and legal memorandum together, obtaining further insights from the SEB members, coordinating with OGC and the awardee's counsel, and submitting the additional documentation, COSF and legal memorandum to GAO. The protester reviewed the Government's response to the supplemental protest and submitted additional comments. OCC and OP then had to examine that 43 page response to decide whether further action was needed. After consulting with OGC, we all agreed the record was complete and no further response was necessary.

Dealing with Protests – How LaRC Won the STARSS III Protest

The Decision. GAO issued its decision denying the protest on 3 August 2016, the 100th day following the original protest. The decision denied each allegation made in both the protest and supplemental protest, finding NASA conducted the source selection and evaluation in a manner consistent with what was contained in the solicitation and finding NASA's evaluation was reasonable and proper in all respects.

Some Thoughts about Addressing Protests. Winning a protest such as this, as you can see, is not something that simply happens. There is a lot of communication, effort and over-time needed to meet the very tight schedule imposed by law. We were in nearly constant contact with OGC, in addition to continuous meetings, telecons and e-mails among the LaRC team members. Putting together a winning AR requires work not just from a team of procurement and legal personnel, but also SEB members. We were fortunate to have significant help from some SEB members in assembling the AR and in providing valuable insights into why findings were worded as they were and identifying those portions of the protester's proposal that supported the SEB's conclusions.

It has been pointed out that we actually won the protest a year before it was filed. This is so because of the painstaking work of the SEB and supporting personnel in fashioning the solicitation and conducting the evaluation. Many of the findings that were the subject of the protest were, in fact, questioned by both the contracting officer and legal advisor when they first were drafted. By constantly reviewing the findings and documenting why they were made in the manner in which they finally appeared, as well as documenting in detail why the Source Selection Authority made the decision as he did, we were able to present a clear, cogent picture, using contemporaneous documents, of how the evaluation was conducted and how the award decision was made. It is this team effort, made over the entire procurement process, which allows us to present the reasoning that wins protests and allows LaRC and NASA to conduct its business in the time and manner necessary. Without this painstaking dedication to conducting a fair, clear procurement on the part of both the technical and business community at LaRC, we would not have the record of success that we do.

In short, winning a protest involves a major team effort. It is not something that OP or OCC can do alone – you, the user,

are an integral part of making the procurement successful by providing a clear statement of the technical requirements and adhering to the evaluation criteria of the solicitation. By working together in this fashion, we can ensure LaRC obtains the best results in making award decisions that are legally supportable, with no disruption to critical support our contractors provide to your organizations.



The Federal Contracts “Watchdog”—Bid Protests Statistics at the GAO

NASA and all other federal agencies are required to award government contracts in accordance with numerous acquisition laws, regulations, and the terms of the solicitation. If a party seeking a government contract believes NASA violated procurement law or regulation in the award of a contract, or failed to comply with the terms of the solicitation, that party has the legal right to file a bid protest with the U.S. Government Accountability Office (GAO). The GAO provides a forum for the resolution of bid protests (among other GAO “watchdog” functions). The majority of disappointed bidders file with the GAO rather than the Court of Federal Claims (“COFC”) because it is a cost effective, quicker forum.

The GAO is an independent, nonpartisan agency that works for Congress. Often called the “congressional watchdog,” the GAO investigates how the federal government spends taxpayer dollars. The head of GAO, the Comptroller General of the United States, is appointed to a 15-year term by the President from a slate of candidates Congress proposes. With the legal authority to examine all matters relating to the receipt, disbursement, and use of public funds, the GAO also performs an important bid protest function.

For Fiscal Year 2015, the GAO received 2,496 new protests and closed 2,647 bid protests. The GAO has been publishing its annual bid protests statistics to Congress since 1995. In 1995 the GAO reported it received 2,334 new protests and closed 2,528. It is interesting to note those 1995 numbers are fairly consistent with the number of filings in 2015 despite the increased complexity of federal contracting and the increase in expenditures on federal contracts over those 20 years. The GAO remains the chosen forum for protestors’ high dollar, complicated contracts.



So how often do protestors win contract bid protests against Federal Agencies? For Fiscal Year 2015, the GAO reports protestors obtained some form of relief in 45 percent of cases closed, either as the result of an agency’s voluntary corrective action or a GAO decision sustaining some or all of the protest grounds. This “effectiveness rate” is marginally higher than it has been in the previous several years, when it hovered between 42 percent and 43 percent.

Perhaps an even more interesting, and useful, question raised by the GAO statistics is: what are the main reasons for sustaining protests? In FY 2015, GAO identified five grounds of protest as the most prevalent. Several of these grounds could exist in one contract case, or one of the grounds could be the sole reason an award was overturned. But of all things that could go wrong during a contract bid evaluation, these were the five areas that reared their ugly heads most, and allowed protestors to win: 1) Unreasonable cost or price evaluation; 2) Unreasonable past performance evaluation; 3) Failure to follow evaluation criteria; 4) Inadequate documentation of the record; 5) Unreasonable technical evaluation.

At LaRC every effort is made by a team of professionals working together—scientists, engineers, contracting specialists, finance officials, attorneys and more—to build and award contracts that will withstand protests. It requires a team of varied professionals to identify and articulate contract requirements, to draft iron-clad and understandable terms, to evaluate and choose the best proposals, and to defend contract decisions. OCC encourages anyone who cares about the mission to serve at least once as a Source Evaluation Board member. In the long run, those are the folks who really make sure LaRC contracts empower the Center to do its work.

Transgender Inclusion in the Federal Workplace

Countless studies have concluded that diversity is an asset to the success of any high-performing organization and LaRC has consistently emphasized the importance of diversity and inclusion in its programs and policies. But do our programs and policies address inclusion of transgender individuals? How should we define transgender individuals? Do we need a definition? What are our responsibilities as federal employees with respect to transgender inclusion in the federal workplace?



The legal framework for the prohibition on gender stereotyping originates in Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, national origin, religion, reprisal/retaliation, and sex, including gender, pregnancy and sexual orientation. Recent case law has clarified that gender stereotyping is prohibited in the federal government under Title VII. Therefore, it is important to understand the meaning of “transgender individuals.” The Office of Personnel Management (OPM) defines transgender individuals as, “people with a gender identity that is different from the sex assigned to them at birth. Someone who was assigned the male sex at birth but who identifies as female is a *transgender woman*. Likewise, a person assigned the female sex at birth but who identifies as male is a *transgender man*. Some individuals who would fit this definition of transgender do not identify themselves as such, and identify simply as men and women, consistent with their gender identity.” (OPM, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/>).

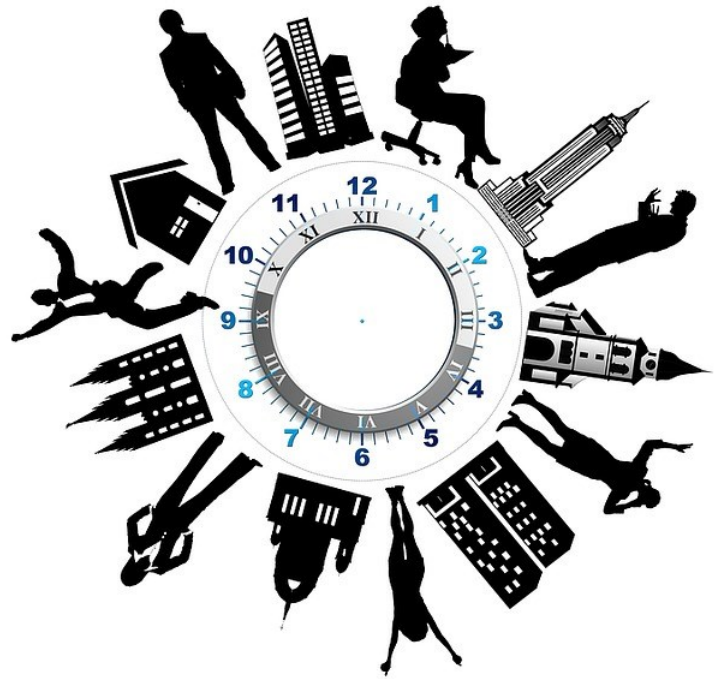
Recent decisions by the Equal Employment Opportunity Commission (EEOC) have further clarified agencies’ responsibilities related to transgender inclusion. For example, in *Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, (May 21, 2013), the Commission held that intentional misuse of a transgender employee’s new name and pronoun may constitute sex-based discrimination. Likewise, in *Complainant v. Dep’t of Veterans Affairs*, EEOC Appeal No. 0120133123 (Apr. 16, 2014), the Commission held that an employer’s failure to revise its records pursuant to changes in gender identity stated a valid claim of sex discrimination under Title VII.

Transgender Inclusion in the Federal Workplace

Although rights and responsibilities are still evolving, below is a non-exhaustive list of areas that have been clarified:

- ◆ Regarding dress and appearance, LaRC does not have a specific dress code, though employees are expected to dress professionally, consistent with their work requirements. With that in mind, employees are free to dress according to their gender identity. Once an employee has informed management that he or she is transitioning, he or she can wear the clothes associated with the target gender.
- ◆ Employees should use the names and pronouns appropriate to the gender a transgender individual is presenting in the workplace. Further, agency records should reflect the correct name and pronoun.
- ◆ Once a transitioning employee has begun working in the gender that reflects his or her gender identity, agencies should allow access to restrooms consistent with his or her gender identity. LaRC also has a number of single-user restrooms available on center, which can be accessed by all employees.
- ◆ Transitioning employees may use sick leave to receive treatment associated with their transition.

Undoubtedly, it is important to keep apprised of our responsibilities as a federal employee with respect to transgender inclusion in the federal workplace. Diversity and inclusion promote collaboration and participation by individuals with different ideas and perspectives, ultimately resulting in a positive impact on the mission of an agency. OCC remains available to assist, should questions or concerns arise related to this evolving area of law.



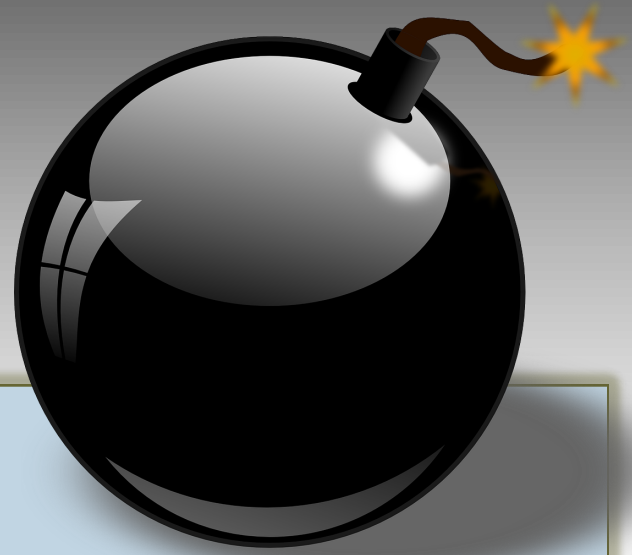
RECENTLY ISSUED U.S. PATENTS

MAY 1, 2016—SEPTEMBER 30, 2016



- Stanley E. Woodard, NASA LaRC; Donald M. Oglesby and Bryant D. Taylor, Swales Aerospace. Patent Number 9,329,149 issued May 3, 2016 for **Wireless Chemical Sensor and Sensing Method for Use Therewith**
- Stanley E. Woodard, NASA LaRC; Bryant D. Taylor, Alliant Tech Systems. Patent Number 9,329,153 issued May 3, 2016, for **Method of Mapping Anomalies in Homogenous Material**
- Mehti Koklu, NASA LaRC. Patent Number 9,333,517 issued May 10, 2016 for **Fluidic Oscillator Array for Synchronized Oscillating Jet Generation**
- Michael G. Jones and Douglas M. Nark, NASA LaRC; Earl Ayle and Fumitaka Ichihashi, Hexcel Corporation. Patent Number 9,334,059 issued May 10, 2016 for **Acoustic Panel Liner for an Engine Nacelle**
- Mehti Koklu, NASA LaRC. Patent Number 9,339,825 issued May 17, 2016 for **Fluidic Oscillator Having Decoupled Frequency and Amplitude Control**
- Sean A. Commo and Keith C. Lynn, NASA LaRC; Drew Landman, Old Dominion University; Michael J. Acheson, NASA LaRC. Patent Number 9,354,134 issued May 31, 2016 for **In Situ Load System for Calibrating and Validating Aerodynamic Properties of Scaled Aircraft in Ground Based Aerospace Testing Applications**
- Joseph N. Zalameda, U.S. Army Research Laboratory; Patrick H. Johnston, NASA LaRC. Patent Number 9,354,206 issued May 31, 2016 for **Floating Ultrasonic Transducer Inspection System and Method for Non-Destructive Evaluation**
- Tak-Kwong Ng and Carl S. Mills, NASA LaRC. Patent Number 9,354,880 issued May 31, 2016 for **Processing Device for High-Speed Execution of an xRISC Computer Program**
- Brian M. Howerton and Michael G. Jones, NASA LaRC. Patent Number 9,355,194 issued May 31, 2016 for **Graphical Acoustic Liner Design and Analysis Tool**
- Stanley S. Smeltzer, III, NASA LaRC; Eric Lundgren, National Institute of Aerospace Associates. Patent Number 9,370,918 issued June 21, 2016 for **Methods for Using Durable Adhesively Bonded Joints for Sandwich Structures**
- Russell W. Smith, H.K. Rivers and Joseph G. Sikora, NASA LaRC; March C. Roth, Modern Machine & Tool Co., Inc.; William M. Johnston, Lockheed Martin Corporation. Patent Number 9,400,237 issued July 26, 2016 for **Optical Method for Detecting Displacements and Strains at Ultra-High Temperatures during Thermo-Mechanical Testing**
- Qamar A. Shams, NASA LaRC; Allan J. Zuckerwar, Analytical Services & Materials, Inc.; Albert L. Dimarcantonio, NASA LaRC. Patent Number 9,445,779 issued September 20, 2016 for **Infrasonic Stethoscope for Monitoring Physiological Processes**
- Jae-Woo Kim, Science and Technology Corporation; Sang H. Choi, Sr. and Peter T. Lillehei, NASA LaRC; Sang-Hyon Chu, National Institute of Aerospace Associates; Yeonjoon Park, Science and Technology Corporation; Glen C. King and James R. Elliott, NASA LaRC. Patent Number 9,446,953 issued September 20, 2016 for **Fabrication of Metallic Hollow Nanoparticles**
- Mark B. Gruber, Accudyne Systems, Inc.; Brian J. Jensen and Roberto J. Cano, NASA LaRC. Patent Number 9,447,260 issued September 20, 2016 for **Methods for Preparing Nanoparticle-Containing Thermoplastic Composite Laminates**
- Cheol Park, Godfrey Sauti and Jin Ho Kang, National Institute of Aerospace Associates; Sharon E. Lowther, Sheila A. Thibeault and Robert G. Bryant, NASA LaRC. Patent Number 9,449,723 issued September 20, 2016 for **Nanostructure Neutron Converter Layer Development**
- Yeonjoon Park, Independent Inventor; Sang Hyouk Choi, NASA LaRC. Patent Number 9,449,818 issued September 20, 2016 for **Double Sided Si(Ge)/Sapphire/III-Nitride Hybrid Structure**
- Yeonjoon Park, National Institute of Aerospace Associates; Sang Hyouk Choi, NASA LaRC. Patent Number 9,455,374 issued September 27, 2016 for **Integrated Multi-Color Light Emitting Device Made with Hybrid Crystal Structure**

Humor



Mathematical Notes

Dear Algebra,

Please stop asking us to find your X – she's not coming back.

P.S. – We don't know Y either.

More Murphy's Law Corollaries

- ◆ If Murphy's law is correct, everything East of the San Andreas Fault will slide into the Atlantic.
- ◆ Murphy's laws of computers:
 - ◇ Any cool program always requires more memory than you have.
 - ◇ When you finally buy enough memory, you will not have enough disk space.
 - ◇ If a program actually fits in memory and has enough disk space, it is guaranteed to crash.
- ◆ Klipstein's laws applied to Prototyping and Production:
 - ◇ Tolerances will accumulate unidirectionally toward maximum difficulty to assemble.
 - ◇ If a project requires "n" number of components, there be "n-1" units in stock.
 - ◇ A transistor protected by a fast-acting fuse will protect the fuse by blowing first.

**Limited Time
Offer! Free to OGE
450 and 278
Filers!**

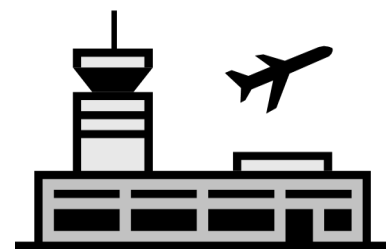
All current NASA employees who file a financial disclosure report (OGE Form 450 or 278) in 2016 must complete annual ethics training before November 1, 2016. You may take this training live at Langley or other NASA centers, or online through SATERN.

**NASA Langley Office of
Chief Counsel Human
Relations and Ethics Team**

**For more information
please call OCC at
757-864-3221**

October is the Time for Annual Ethics Training

The online training is "*Ethics for NASA Employees (2016)*," and covers general ethics topics. This course is either already in your SATERN learning plan (for people required to take the training), or can be found in the SATERN course catalog. NASA Langley's live annual training this year is entitled "*The Five-and-a-Half Habits of Substantially Ethical People*," and will cover the same topics, emphasizing recent developments and practical guidance in avoiding perceived pitfalls.



PLEASE NOTE

Annual ethics training is a separate regulatory requirement, and cannot be fulfilled by taking IT Security Training, attending Foreign Travel Briefings, or watching Presidential Debates.



**Watch @LaRC for
Times and Dates**